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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210863
Party	Plaintiff Chris Economides III
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Date	12/26/2013
Attachments	Opposer has standing.pdf(243510 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

TRADEMARK TRIAL AND APPEAL BOARD

OPPOSITION NUMBER 91210863

CHRIS ECONOMIDES, III,)	
an individual,)	
OPPOSER)	
)	RESPONSE TO
MOTION		
v.)	TO DISMISS
)	
THANCO PRODUCTS AND IMPORTS, INC.,)	
a Texas Corporation,)	
APPLICANT)	

Opposer in this matter Chris Economides, III hereby presents this Response to Applicant's Motion to Dismiss Opposer's Amended Notice of Opposition and states as follows:

1. Opposer has standing

Opposer has complied with the requirements of the United States Patent and Trademark Office Trial and Appeal Board to show that he has standing to proceed with opposition in this matter. Applicant, in his motion to dismiss has intentionally attempted to mislead the USPTO that Opposer does not have standing. The case law, however, that they cite actually confirm standing as will be shown here.

In their motion, applicant stated that “the broad requirements of § 13, an opposer must meet two judicially-created requirements in order to have standing:” the opposer must have (1) a “real interest” in the proceeding; and (2) a “reasonable basis” for his belief of damage. *Ritchie*, 170 F.3d at 1095. These standing requirements have been established in order to “prevent litigation where there is no real controversy between the parties, where a plaintiff, petitioner or opposer, is no more than an intermeddler.” *Lipton Industries*, 670 F.2d at 1028-29.”

An opposer has a real interest if he alleges a direct and personal stake in the outcome of the proceeding. T.B.M.P. § 309.03(b). Though there is no requirement that actual damage be pleaded in order to establish a real interest in the proceeding, the opposer must show that he has a personal interest in the outcome of the proceeding that is different than or beyond that of the general public. T.B.M.P. § 309.03(b); see also *Int’l Order of Job’s Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 1092 (T.T.A.B. 1984). For instance, in *Doyle v. Al Johnson’s Swedish Restaurant & Butik, Inc.*, the petitioner sought to cancel the registrant’s mark featuring goats positioned on a grass roof, claiming he was damaged by registration of the mark because he was not able to “satisfy his desire to take photographs of goats on grass roofs.” *Doyle v. Al Johnson’s Swedish Restaurant & Butik, Inc.*, 2012 TTAB LEXIS 30, 1-2 (T.T.A.B. 2012). The Board found that the petitioner did not have a real interest in the proceedings because he did not allege that the registered mark “somehow prevents petitioner himself from placing

goats on a grass roof and taking their picture, or taking pictures of goats on a sod roof found elsewhere.” Id. at 5-8.

Opposer has stated that he, through his D/B/A Apollo Graphics and Marketing, is in a similar business as Applicant. Both sell items to Greek Orthodox Churches and Greek Festivals. The general public may attend a Greek Festival, but they do not sell items to the Greek Festival. Opposer has a direct and personal stake in these proceedings due to the fact that if applicant were to obtain registration of the mark as applied for it would directly hinder his business and sales to Greek Festivals.

Opposer also faces actual damage should registration be allowed for the same reason. To use the same case law example provided by Applicant, should registration be allowed there would be no other grass roof for him to sell to Greek Festivals because the grass roof in this case is the mark as applied for. This basis for damage is not subjective, it is actual and one of the objectives of applicant in seeking registration is to restrict sales of items with the mark as applied for.

Applicant also claims that there has not been a claim that the mark as applied for is merely descriptive. This claim was originally made by the United States Patent and Trademark Office in their Office Action dated April 18, 2008 refusing the registration. Opposer claimed in his objection that the mark is merely descriptive and that the applicant has failed to show secondary meaning to overcome this deficit.

Further, Opposer has claimed that he has sold items with the mark as applied for. Applicant shows standing of the Opposer when they state in their motion that “the opposer may establish standing by pleading and proving that he is manufacturing or selling goods that are similar to those of the applicant, of which the mark is equally descriptive. See, e.g., Consolidated Foods Corp. v. Big Red, Inc., 226 U.S.P.Q.

829, 831 (T.T.A.B. 1985); *Federal Glass Co. v. Corning Glass Works*, 162 U.S.P.Q. 279, 282-83 (T.T.A.B. 1969); *McCarthy on Trademarks and Unfair Competition*, § 20:11 (4th ed.2013).

Applicant attempts to again mislead the USPTO by using the honest words of Opposer and attempting to convince the USPTO that they mean something else. Applicant attempts to imply that when Opposer stated that he “has sold items” it means he is not currently selling items. Both Opposer and Applicant have stated that they work with Greek Festivals in the United States. These Greek Festivals are seasonal events. They do not occur every week, nor do they occur every month. In fact, with very few exceptions (Florida being the primary example) Greek Festivals take place between the months of May and November every year.

Opposer knows that one of the primary requirements of the United States Patent and Trademark Office is honesty in the filings of persons before it. Neither Opposer nor Applicant can honestly claim that they are selling now to Greek Festivals as there are no Greek Festivals taking place. The only honest statements are that both “have sold items” and that both “hope to sell items”. Any other claim as it regards to sales to Greek Festivals would be a lie.

In this matter, Opposer has a real stake in the proceedings because of his business in which he has sold identical items as applicant. His interest is at a much more personal level than the general public and he faces actual damage should registration be granted for the mark as applied for. Consequently, Opposer has met the grounds for standing in this matter. T.B.M.P. Section 309.03(b) states “At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show a ‘real interest’ in the proceeding, and a ‘reasonable basis for its belief of damage.’” (*Ritchie v Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999) and *Lipton Industries, Inc. v Ralston Purina Co.*, 6y70 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

2. Opposer has stated claims.

As is stated in the applicant's motion, "Opposer must also allege facts which would, if proved, establish that there is a valid ground for opposing Thanco's applications. Young, 152 F.3d at 1380. Pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, made applicable to trademark proceedings by Trademark Rule 2.116(a), the Amended Opposition must "set forth a short and plain statement showing why [he] believes [he] would be damaged by the registration of the opposed mark[s] and state the ground[s] for opposition." McDonnell Douglas Corp. v. Nat'l Data Corp., 1985 TTAB LEXIS 144, 7-8 (T.T.A.B. 1985). In determining whether an opposer has stated a plausible claim for relief, the Board will examine whether "the pleading gives fair notice and states the elements of the claim plainly and succinctly. Sufficient detail must be given so that the [applicant] may obtain a fair idea of the [opposer's] complaint and of the legal basis for recovery." Id. at 8; see also Iqbal, 556 U.S. at 677-678 (finding that the pleading standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.").

Opposer has provided in great detail the claims for the opposition. These grounds are with sufficient detail and also with sufficient factual allegations which, if proved, would establish that there is valid ground for opposing the registration of the mark as applied for. Opposer has provided greater detail than required as decided in Ashcroft v Iqbal, 556 U.S. 662, 677-678 (2009) further supporting Bell Atlantic Corp. v Twombly, 550 U.S. 544, 555 (2007) which states that "Sufficient detail must be given so that the [applicant] may obtain a fair idea of the [opposer's] complaint" (finding that the pleading standard "does not require detailed factual allegations."

Applicant, in his motion, spends great detail arguing that the opposer "Cannot Assert a Claim for Improper Prosecution of the Mark." This not only confuses the Opposer but also shows that the

Applicant is also confused in their arguments.

In the Order issued by the USPTO Opposer was specifically instructed that this argument could not be included in the Amended Notice of Opposition. A simple review of that Amended Notice of Opposition will show that this argument was not raised.

Applicant then argues that Opposer has not proven Fraud. Applicant spends a great amount of time and detail arguing the merits of what does and does not constitute fraud. While these arguments are perhaps well founded, they are not appropriate at this stage in the proceeding. Opposer must only state well detailed grounds for opposition that, if proved, would show that registration of a mark as applied for is not valid.

Opposer has made detailed allegations of Fraud and also conspiracy to commit Fraud in this Opposition. Through depositions, interrogatories, and other forms of discovery he will prove these allegations and present evidence to the Board during the trial period of this opposition. Applicant attempts to argue their case now, and not during the proper phase.

Applicant does not argue that Fraud is a not a valid ground for opposition, he merely argues that Opposer did not prove that Applicant has committed fraud; had knowledge of fraudulent statements, or made misrepresentations of truth and fact that would be material.

Opposer has stated in his Amended Notice of Opposition that the Applicant has committed fraud in the prosecution of the mark as applied for both by himself and in a conspiracy with others. Even Applicant himself agrees that this is enough to sustain a valid claim of opposition as he states in his motion that "Fraud in procuring a trademark registration occurs when an applicant "knowingly makes

false, material representation with the intent to deceive the PTO.” *In re Bose Corp.*, 580 F.3d 1240, 1245 (Fed. Cir. 2009).

The Fraud committed by the applicant, both alone and with a conspiracy with others, undermines the entire basis of the arguments raised by applicant as they apply to secondary meaning. Without this applicant would fail to overcome the thresholds required for registration. A fact is “material” if it would have constituted grounds for denial of the registration had the truth been known.” *Citibank, N.A. v. Citibanc Group, Inc.*, 724 F.2d 1540, 1544 (11th Cir. 1984) (citing *Giant Food, Inc. v. Malone & Hyde, Inc.*, 522 F.2d 1386 (C.C.P.A. 1975); *Hollowform, Inc. v. AEH*, 515 F.2d 1174 (C.C.P.A. 1975)); see also *Morehouse Mfg Corp. v. J. Strickland and Co.*, 407 F.2d 881 (C.C.P.A. 1969); *The Ritz Hotel, Ltd. v. Shen Mfg. Co., Inc.*, No. 05-4730, 2009 U.S. Dist. LEXIS 22194, at *11 (E.D. Pa. Mar. 18, 2009); *Pennwalt Corp. v. Sentry Chemical Co.*, 219 U.S.P.Q. (BNA) 542, at *38-39 (T.T.A.B. 1983); *McCarthy on Trademarks* § 31:67.

As the applicant knew that he must overcome the thresholds for registration, these acts of Fraud were committed with specific intent. The applicant must make the misrepresentation with the intent to deceive the U.S. Patent and Trademark Office.

Rule 9(b) of the Federal Rules of Civil Procedure, made applicable to Board proceedings by Trademark Rule 2.116(a), requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake ...” *Exergen*, 575 F.3d at 1327. “[T]his means the who, what, when where, and how of the alleged fraud.” In the Amended Notice of Opposition the Opposer has stated at least two particular circumstances of Fraud and, again, will provide specific evidence to prove without doubt the existence of the Fraud and the intent and specifically the conspiracy with others who have offered supporting declarations to commit Fraud.

Opposer was required by USPTO rules to state sufficient grounds which are to be proved later. Opposer has not presented his case for Fraud at this time, merely made his adequate claims and grounds for opposition. The United States Patent and Trademark Office Trademark Trial and Appeal Board Trademark Manual for Procedure Section 309.03(c) states:

“A plaintiff must also plead (and later prove) a statutory ground or grounds for opposition or cancellation. A plaintiff may raise any available statutory grounds for opposition or cancellation that negates the defendant’s right to registration.”

See *Young v AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998); *Jewelers Vigilance Committee Inc. v Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); *Lipton Industries, Inc. v Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *Estate of Biro v Bic Corp.*, 18 USPQ2d 1382, 1386 (TTAB 1991); *Marmark Ltd. V Nutrexpo S.A.*, 12 USPQ2d 1843, 1844 (TTAB 1984); and *Crocker National Bank v Canadian Imperial Bank of Commerce*, 223 USPQ 909, 910 n. 10 (TTAB 1984).

Applicant also argues against the claim for opposition that the mark as applied for cannot be registered due to the fact that it is a national symbol of Greece. Applicant argues that this is an attempt by Opposer to connect this to a failure of prosecution, which is barred. Opposer has never attempted to connect this ground for opposition to improper prosecution. Instead, a refusal to register a mark as applied for because it is a national symbol is a ground which alone may refuse registration. Applicant shows this in their motion when they state ‘Under 15 U.S.C. § 1052(a), a trademark may be refused registration if, inter alia, it “consists of or comprises ... matter which may disparage or falsely suggest a connection with ... national symbols.”

Applicant himself has claimed that OUZU is a national symbol of Greece in his filing with the USPTO

on November 29, 2012. Now, however, they choose to offer a self-serving argument that against their very own claim. Once again, Opposer will prove this ground for opposition during the trial phase of this opposition as is required by USPTO rules by presenting expert testimony as it regards specifically to this matter.

Opposer also made a third claim for opposition, the claim that Applicant has failed to prove secondary meaning. In his claim, Opposer detailed numerous failures by Applicant including a) Failure to include survey evidence; b) Failure to include adequate or unbiased customer declarations; c) Lack of Distinctiveness; d) Failure to prove evidence of significant or effective advertising, and e) Lack of sales invoices showing sales of items with the mark as applied for.

Applicant has failed to address this claim for opposition completely in his motion. Applicant fails to argue with any section of this claim, and as such it must be accepted without objection by him. Opposer believes he has shown that all of his claims for objection are valid and will stand, in the alternative, even if the USPTO agrees to dismiss the other two claims, this claim stands without objection.

Finally, Applicant accuses Opposer of violating the Order of the Board by not sending papers by email. Although Applicant fails to state which papers to which it refers, the only paper filed by the Opposer since the Board Order was the Amended Notice of Opposition. This is not the first time the Applicant has made a false statement to the USPTO during these opposition proceedings regarding the service of papers. Unfortunately, during the previous instances, Opposer did not have proof to show the USPTO Board that Applicant was lying. Opposer has always had the utmost respect for the USPTO, these proceedings, and its personnel. The Amended Notice of Opposition was sent by email to the Applicant's attorney of record, as required by the Board's Order. A proof of mailing, along with time stamp, was placed in the "Sent" file of Opposer's email account. Opposer is prepared to forward this to any and all

representatives of the USPTO, the TTAB, or any other party necessary to show that he has complied and been telling the truth and that the only party who has lied to the USPTO is the Applicant. Opposer is also prepared to then ask for sanctions or any other measures against Applicant deemed appropriate.

3. CONCLUSION

The United States Patent and Trademark Office lists on its ESTTA website a guideline for a notice of opposition. In that guideline it states:

“A proper pleading for a notice of opposition or petition for cancellation contains a ‘short and plain statement of the claim showing that the [filer] is entitled to relief. The pleading states in numbered paragraphs facts which if proven would establish that the oppose has (1) standing to oppose registration or to petition for cancellation; and (2) a legal ground for opposition or cancellation. The filer does not have to actually prove these allegations at this time, but must have a good faith belief in their truth.”

(<http://estta.uspto.gov/docs/help.html>).

Opposer has shown that he has standing to oppose the registration of the mark as applied for both with a real interest and a reasonable basis for damage should registration be granted.

Opposer has shown that he has made valid claims for opposition on the grounds of Fraud by the Applicant.

Opposer has shown that he has made a valid claim of opposition that registration should not be

granted due to the fact that OUZO is a national symbol of Greece.

Opposer has also shown that he has made a valid claim of opposition without objection by applicant that registration should not be granted due to the fact that secondary meaning has not been proved.

These claims will be proven during these proceedings as required by the rules of the USPTO.

The courts have a long history with regard to a motion to dismiss based on F.R.C.P. 12(b)(6) and have written that "It is not a procedure for resolving a contest about the facts or the merits of the case. In reviewing the sufficiency of the complaint, the issue is not whether the plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims asserted." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

Opposer would argue to the Board that he should certainly be entitled to offer factual evidence because it is right and fair and also for the reason than to counter the numerous deliberate misrepresentations of truth and fact presented by the applicant in the hope of prejudicing the Board against Opposer.

Opposer has complied with the rules and regulations of the USPTO and the TTAB, and has repeatedly offered only factual statements and pleadings. Opposer has shown that this is not the situation with the applicant, even if only limited to the pleadings in his current motion. Applicant's attempts at deception in this motion should by themselves preclude the granting of said motion.

Opposer has met the thresholds required in the pleadings stage for a Notice of Opposition, both for standing and for the claims of opposition.

WHEREFORE: Opposer respectfully asks that the motion to dismiss be denied and that the trial proceedings be continued.

Opposer further asks for instructions from the USPTO Board on how to properly submit the proof of mailing of his email to applicant of the Amended Notice of Opposition that was sent in compliance with USPTO rules and regulations.

Respectfully submitted this 26th day of December, 2013

/Chris Economides III/

Chris Economides III

CERTIFICATE OF SERVICE

I, Chris Economides III, do hereby affirm that a true and correct copy of the attached Response to Motion to Dismiss Amended Notice of Opposition is being electronically transmitted to the United States Patent and Trademark Office Trademark Trial and Appeal Board on December 26, 2013. Further, a true and correct copy is being sent on the same date to Applicant by depositing with the United States Postal Service via first class mail, with proper postage at the address below:

Peter Harvey

Harvey Siskind LLP

4 Embarcadero Center, 39th Floor

San Francisco, CA 94111

____/Chris Economides III/____

Chris Economides III